No. 10110

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United States
Circuit Court of Appeals
For the Ninth Circuit

ROBERT EARL HOPPER,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

APPELLANT'S PETITION FOR A REHEARING
AND
APPLICATION FOR STAY OF MANDATE

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TO HON. CURTIS D. WILBUR, FRANCIS D. GARRECHT, WILLIAM DENMAN, CLIFTON MATHEWS, ALBERT LEE STEPHENS, AND WILLIAM HEALY, ASSOCIATE JUDGES OF THE CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT:

The appellant herein, Robert Earl Hopper, respectfully petitions this Honorable Court for a rehearing of this cause upon the following grounds, apparent on the face of the majority opinion filed herein on December 6, 1943:

I

The Court erred in holding, in the face of convincing evidence to the contrary, that the hearing held before the local draft board of Yavapai County, Arizona, on June 20, 1941, at Prescott, Arizona (TR 10-73-85), was not a proceeding for reclassification under the regulations, (footnote No. 4, p. 3, of Opinion).

II

The court erred in holding, in the face of the record, that "appellant *has at no time* contended that this hearing effected a vacation or suspension of his existing classification", as the record is definitely to the contrary, (footnote No. 4, p. 3, Majority Opinion). (Our emphasis.) (See Appellant's Opening Brief, filed August 12, 1942, pp. 21-23.)

III

The Court erred in holding, in effect, that the hearing before the draft board of Yavapai County, Arizona, on June 20, 1941, above referred to, did not result in suspending or nullifying appellant's prior classification as Class IV-E.

IV

The Court erred in affirming the judgment of conviction of the District Court of the District of Arizona, upon the grounds above and hereinafter stated.

ARGUMENT

We think the error assigned under this heading that the hearing before the local draft board on June 20, 1941, was not a proceeding for classification, is vividly shown by a mere reference to the record of the hearing

before the local draft board, as it appears on pp. 73-85 of the Transcript of Record. The majority opinion, in footnote 4, p. 3, asserting that "there is no reason for cataloging this inquiry as a proceeding for reclassification under the regulations, and it is abundantly clear that the board did not so regard it", is effectively overthrown by the record as to how the draft board itself did regard this hearing. In the first place, as mentioned on p. 73 of the Transcript of Record, the board, acting for and in behalf of the government, designated the proceedings of June 20, 1941, as:

> "Proceedings before the Local Board of Yavapai County, June 20, 1941.
>
> Present: Alfred B. Carr, Chairman, Lauren V. Sears, Joseph W. Berg, Egbert K. Dutcher, Members, and Nellie G. Prince, Stenographer.
>
> Order No. 217
>
> In the Matter of the Application of
>
> ROBERT EARL HOPPER, JR., for classification as a Minister of Religion, and his application for Extension of Time within which to Appeal the Decision of the Local Board of Yavapai County."

The board, therefore, in its own language and pursuant to its own judgment, designated the proceedings as "The Application of Robert Earl Hopper, Jr. for Classification as a Minister of Religion." Surely the board knew what it was doing and how to designate it, to wit: As a proceeding for reclassification. Appellant was not then classified as a minister. It is equally certain that the regulations in effect at that time required that if a hearing for reclassification was held to "determine the classification of the registrant," the classification of the registrant must be determined, and that *"such determination shall be, and have the effect of, a*

new and original classification, even though the registrant is again placed in the class that he was before the case was re-opened." (Our italics). See Amendment No. 60, "amending the regulations so as to clarify the provisions providing for local boards' consideration of whether the classification of a registrant should be changed."

> Federal Register, Vol. 6, No. 104, p. 2603, with particular reference to Sec. XXX as amended, par. 385 a, 387 b and c, and 388.

This regulation is quoted from and commented upon by Judge Denman in his dissenting opinion. It became effective ten days after its promulgation on May 26, 1941, and was therefore the controlling regulation on the date of said hearing.

Not only did the board itself consider this as a hearing for reclassification, but it went on through pp. 74 to 85 inclusive; swearing and examining witnesses, etc., with the same formality as though it were a court of record. To say that "such a proceeding furnishes no reason for regarding it as one for reclassification" is flatly refuted by the record.

It is clear, then, that the board positively and deliberately regarded its action of June 20, 1941, "as a proceeding for reclassification under the regulations." It is equally clear that appellant has specifically contended that the hearing effected a vacation or suspension of his existing classification. These are important matters and go to the very heart of the case. We shall presently submit more upon this point. The majority opinion, moreover, in speaking of the occasion when the defendant appeared before the board for this hearing, states that "the members thereof interrogated him, *apparently for the purpose of satisfying*

themselves whether there was any ground for considering his claim to be a minister, and to determine his good faith or lack of it." (Italics ours). If that statement does not stamp the proceeding before the board as one based on an application for reclassification, we must acknowledge our inability to give it any meaning whatever.

Moreover, this Exhibit XIV was treated throughout all the proceedings herein as a substantial feature of the government's case. The testimony of witnesses before the draft board has been referred to and relied upon by the government, to serve its own ends, but it seems now to contend that, in such respects as it may serve the interests of the appellant, it has no existence.

There was nothing before this hearing, and nothing considered by it, save the question of appellant's classification. It was either a "proceeding for reclassification" or it was nothing. And the government, having so paternally sponsored and fostered it, can now hardly be heard to say, or prompt the court to say, that it was nothing.

As Judge Denham points out in his dissent, the appellant and his witnesses, throughout this hearing, not being or permitted to be represented by counsel, were at a disadvantage. On the other hand, A. B. Carr, who presided at the hearing, was not only an able lawyer, but, as we believe, has been admitted to practice in this court, of which, of course, judicial notice will be taken. Had this "proceeding" not been for reclassification, he would not have given it that significant title.

II

The majority opinion further says that "appellant has at no time contended that the hearing effected a

vacation or suspension of his existing classification." This statement, we believe, is an inadvertence only because for the moment some unanswerable evidence to the contrary escaped the Court's attention. It appears on page 97 of the Reporter's Transcript that the testimony of the defendant relating to his transmission to the draft board of his conscientious objection papers, was as follows:

Q. "After you filled them out, did you ever get a notice of a change in classification?" (From I-A).

A. "Never did."

Q. "Did you ever get any further notice from them at all?"

A. "No, not until June, when they said to 'Report to camp.' That is the first I knew of it." (This order was dated June 11, and he received it June 14). (TR 81, line 11).

Q. "Then did you go in to see the local board?" (RT p. 98.)

A. "I did."

Q. "Who did you there contact?"

A. "I contacted Mr. Dise." (Secretary of the Board.)

Q. "*Did you then request a different classification* from that which you had been given?" (Our italics).

A. "I did. Went in for the purpose of appealing my case."

Q. "And what classification was that?"

A. "IV E."
(The notice to go to camp was the first notice he had of classification as IV E. (RT p. 70).

Q. "And you said—was the notice to appear to go to camp the first notice you had of your classification as IV E?"

A. "Yes sir, with the exception of a blank I received from the Citizens Religious Organization which I didn't know anything about at that time, *not having received any classification.*" (Italics ours).

Q. "Now then, you went in to Prescott to see Mr. Dise; see the board, is that right?"

A. "That is right, after I received the notice."

Further on this point, and referring to pp. 22-23 of Appellant's Opening Brief, filed August 12, 1942, with the Clerk of this Court, we find the following:

> "And if the Court should disregard all else, the government's evidence (Govt. Exhibit XIV, TR 73) conclusively shows that defendant was arrested, tried, and sentenced *while he had an application pending for change in classification;* this is evidenced by the local board's own stenographic report of proceedings. (Exhibit XIV)". (Italics ours).

Quoting further, from page 2 of the same brief, we find the following.

> "Upon receipt of the aforementioned order" (the order to report for work of national importance, etc.) "the defendant called upon the selective service board at Prescott, Arizona" (defendant lives on a farm some sixty miles from Prescott in an inaccessible cattle ranch country or community) "and advised them *that he had never received a notice of his classification of IV E,* and then informed the board or its secretary, *that he had been erroneously classified and that he was one of Jehovah's Witnesses and a Minister of the Truth,* and as such he was commissioned 'to preach this gospel of the Kingdom in all the world for a Witness' and as such minister he was entitled to

the classification of ordained minister of religion, or IV D. *He then made application for such classification of IV D and the local board held a hearing upon this matter.* (TR 73, Government's Exhibit XIV). *The local board never did dispose of this application and never did act upon the evidence adduced at the hearing of said application.*" (Italics ours).

III

From the foregoing discussion it is plainly established that the hearing before the local board at Prescott on June 20, 1941, was in every sense "a proceeding for reclassification," and under Amendment 60 of the regulations above referred to, it resulted in a cancellation of appellant's existing classification and left him as he is today, free from any classification whatsoever. It is the undisputed law of the land.

Some stress is laid in the opinion on the fact that inasmuch as appellant had admitted receiving all other notices mailed to him by the draft board, it is strongly implied that in all probability he also seasonably received the notice clasifying him IV E. We think the opposite conclusion has more support in reason and justice. If he had been faithful in responding to all the other notices and orders he had received, and this is not only not questioned, but advanced by the government, we think it all the more probable that, had he received the notice of his IV E classification, it obviously being of great importance to him, he would have instantly responded by appearing before the board. In other words, the circumstances above mentioned lend far greater support to the testimony of the appellant that he had not received the notification than to the theory of the majority opinion, that he was misrepresenting the facts in denying such re-

ceipt. For that matter, we do not find anywhere in the record that appellant disregarded the advice of the company servant and the notice he had received from a Quaker organization concerning his prospective service in the civilian camp. What we do find is, that because he had not received any notice from his draft board of his IV E classification, or of any classification other than 1-A, he believed it to be right and proper that he should await such notice before taking any action; manifestly a prudent course.

Further, the majority opinion (p. 3) contains this rather caustic suggestion:

> "From his story the board was warranted in believing not only that he was trifling with the truth when he denied knowledge of his IV E classification, but that his present claim to exemption as a minister was a mere pretense."

We think the facts above stated present a sufficient refutation of this disparaging remark.

Also, it was shown not only by the testimony of the defendant, but that of Edward F. Bucey, a witness for him (RT p. 113) that he had been out with the defendant many times carrying the gospel message to people with Mr. Hopper; also that it was his duty as a company servant to issue identification cards to various ministers. He was asked if he issued one to Robert Hopper, and his answer was that he did, stating that it was identical with defendant's Exhibit C for identification, and that it is the regular witness testimony card for Jehovah's Witnesses.

This witness also stated that he actually had occasion to observe defendant in preaching the gospel from some time in February, 1940 (RT p. 114), when he came

from California and became associated with the company, until the last of June, 1940, when he left there. He was asked whether at that time the defendant regularly preached the gospel, and he answered, "Every Sunday."

His mother, Mrs. Fern Hopper, (RT p. 115) was asked if she had occasion to observe her son in the service of preaching the gospel. She answered, "Yes I have. Ever since he has been in Camp Verde he has preached the gospel, since February, 1940, two years," and when asked if he was still engaged in so preaching, she answered, "Very much so." All this does not indicate that his claim of being a minister is a "pretense."

Incidentally, his mother offered convincing evidence that her son had never received any notification of his classification under the Selective Service Act (RT p. 117). She said that she could swear positively he never did, and when asked "How do you know it never arrived?", she said, "Because I watched the mail and looked for it and expected it, and it never came." When asked who got the mail every day, she said, "I got it every day at that time; that is, I picked up the sack and distributed the mail." Further, on page 120, the witness was asked whether or not she was watching the mail to see what ruling the board had made, and whether this went on up until June, and she said, "I watched all the time, and Bob and I talked and wondered why it didn't come in."

In the testimony of William Robert Dingman, as appears on pages TR 74 to 77 inclusive, he testified that he was a company servant of Prescott Company of Jehovah's Witnesses. He stated that he had received, early in the year 1941, advice from the General

Counsel of Jehovah's Witnesses that it had been ruled between said General Counsel and the entire Executive Staff of the Selective Service at Washington, that Jehovah's Witnesses possessing the credentials of ordination and serving as ministers of religion for Jehovah's Witnesses were entitled to exemption as regular or ordained ministers, or as IV D. The defendant, he said, had stated to him at Camp Verde about the last of May, 1941, that his classification was 1 A; that he had registered in his original papers as a conscientious objector and had never received his conscientions objector blanks until he went after them; that as soon as he did obtain them, he had a discussion with the draft board, and since then he had not heard a thing; that this was in the latter part of May or the first of June, 1941. He was then asked by the chairman of the draft board (TR p. 77):

Q. "He stated that he had not received the papers in which he claimed to be a conscientious objector?"

A. *"Oh no. He stated he had not received any further classification."* (Our italics).

At this point we wish to notice the remarks found on page 8 of the majority opinion, as follows:

> "Congress and the Selective Service alike have been considerate in their treatment of those possessing scruples against participation in war. Surely it is not expecting too much to require of them that they do civilian work of national importance at a time when their brothers, under the same compulsion, are giving their lives for them and for the nation."

It is plain that the appellant in this case did not think it was expecting too much of him that he do civilian work of national importance during the war.

As a matter of fact, he had been for five years (TR 93) and was then engaged in that work, as vitally important to the nation as any occupation could be, to wit, that of farming and raising cattle. He is competent at his work; he has been notably successful as manager of the ranch upon which he is and has been employed. It is not unreasonable to believe that this work, at his home ranch, has resulted in a much greater contribution to the war effort than could possibly have resulted under different circumstances, under new and strange directives, wherein it would be long, if ever, ere he could approximate the same efficiency that has marked his work on the home ranch.

IV

From the foregoing discussion it is established that the appellant was arrested, tried, convicted, and sentenced while he was wholly free from any classification whatsoever under Selective Service regulations as they existed prior to or on and after the date appellant was ordered to report to camp for service.

> Amendment to Regulation 60, Federal Register Vol. 6, No. 104, p. 2603, pars. 385, 387b, and 388.

Therefore, no public offense under these regulations could possibly have been legally charged against him, or of which he could have been legally convicted.

Nor is there any sound reason to believe that, had the draft board been fair and considerate enough to dispose of the matter of appellant's application for reclassification after the hearing, he would not have reported to the designated camp. He believed not only that his classification was suspended, but that he had made an appeal which he thought was pending, (RT 76, et seq.). Evidently he did not realize the distinction

between an appeal and a request for reclassification. He had no counsel then.

Further, if the draft board had decided his classification adversely and had notified appellant thereof, he would then have had a valid appeal. Instead, the board instituted this prosecution. The entire proceeding subsequent to the hearing was misleading and unfair so far as the draft board is involved.

It is urged in the concurring opinion of Judge Mathews, touching appellant's assignment of error in the denial of his motion for a directed verdict at the close of all evidence, that the ruling is not a part of the bill of exceptions. If we adhere to naked technicality and consider nothing beyond, this view of the record has some merit, but let us examine the record a little further.

First, the minute entry of March 28, 1942, that "counsel for the defendant now renews motion for a directed verdict on the same grounds heretofore given" (at close of the government's case, TR p. 10), "and it is ordered that said motion be and is hereby denied," (TR p. 12). Thus far Judge Mathews' excerpt is complete and correct, but a few lines farther along on the same page, which we think escaped his attention, we find that:

> "Counsel for the defendant further excepts to the court's refusal to give defendant's requested instructions to the jury."

This, of course, embraced all instructions that had been rejected.

Here, then, is the exception itself.

We find it also urged as error in the notice of appeal

(TR p. 19) and in appellant's assignment of errors No. 12, (Appellant's Opening Brief, p. 6).

It cannot be denied that the motion to direct a verdict was made at the close of all evidence and excepted to seasonably. Admittedly it was made, refused, and exception noted at the close of plaintiff's case, and admittedly made and denied at the close of all the evidence. The exception to the latter ruling is not mentioned by Judge Mathews, but the record of it is clear. The only question is, will this inadvertent omission of former counsel in this case, to include these matters in the formal bill of exceptions, deter this court from considering the claimed error, when complete knowledge of it is otherwise shown? It seems to us that, for the court to consider such a deterrent, would be forsaking the substance and pursuing the shadow.

We think the case of Danaher v. United States, 39 Fed. (2) 325, applies here:

> "Unless there is substantial evidence of facts excluding every hypothesis except guilt, the trial court must instruct the jury to acquit."

The court also says in this case:

> "Where all substantial evidence is as consistent with innocence as with guilt, the appellate court must reverse the conviction."

We beg leave to remind the court that in the argument of this appeal in Los Angeles on October 5, 1942, present counsel suggested to the court his desire to make use of the reporter's transcript. It was suggested to him from the bench that possibly the United States attorney, then present, would agree that this transcript might be treated as a part of the record. The United States attorney agreed in open court that the transcript

might be so considered. He had ends of his own to be subserved, which he stated. As present counsel understood it, an order to that effect was then made. At any rate, the transcript was freely used by counsel for both sides in the ensuing arguments, and thenceforth.

We submit the foregoing argument, together with Judge Denman's dissenting opinion and the authorities he cites, as convincing reasons why a rehearing should be granted and the judgment of conviction reversed.

Respectfully submitted,

E. S. CLARK,
Attorney for Appellant.

No. 10110

IN THE

United States
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For the Ninth Circuit

ROBERT EARL HOPPER, *Appellant,*

vs.

UNITED STATES OF AMERICA, *Appellee.*

APPLICATION FOR STAY OF ISSUANCE OF MANDATE

TO HON. CURTIS D. WILBUR, FRANCIS D. GARRECHT, WILLIAM DENMAN, CLIFTON MATHEWS, ALBERT LEE STEPHENS, AND WILLIAM HEALY, ASSOCIATE JUDGES OF THE CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT:

In the event that this petition for rehearing should be denied, it is the purpose and desire of appellant to apply to the Supreme Court of the United States for issuance of a Writ of Certiorari, and for that reason application is hereby made for a stay of the issuance of mandate of this Honorable Court pending the presentation and determination of such petition for Writ of Certiorari.

Dated at Phoenix, Arizona, this 30th day of December, 1943.

Respectfully submitted,

E. S. CLARK,
Attorney for Appellant.

CERTIFICATE OF COUNSEL

I, E. S. Clark, attorney for appellant, do certify that in my opinion the foregoing Petition for Rehearing is well founded and meritorious and that neither said Petition nor said Application for Stay of Issuance of Mandate is interposed for the purpose of delay.

Dated at Phoenix, Arizona, this 30th day of December, 1943.

E. S. CLARK,
Attorney for Appellant.